Supreme Court, U.S.
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No. 92-225

In The

Supreme Court of the United States

October Term, 1992

FIRST FIDELITY BANK, N.A., NEW JERSEY

Petitioner,

v.

THEODORE RUDBART, NATALIE RUDBART, BEVERLY LITOFF, BENJAMIN WELTMAN, MADELINE OKIN FOR HERSELF AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED AND NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Jersey

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In its petition, First Fidelity Bank showed that the decision of the New Jersey Supreme Court below was inconsistent with federal regulation of a national bank's duties as a fiduciary. We also showed that the New Jersey Supreme Court – reputedly the nation's most consumer activist court – had ignored the fundamental legal principles of *res judicata* and due process in reaching its result. We cited many cases in which this Court has protected national banks from state intrusion. We demonstrated that because there are many national banks scattered throughout the country, these issues are of national importance.

Both the plaintiff class, who bought the Notes involved here, and the Commission, which issued the Notes, have opposed the petition. Both contend the issues are not important. The class contends that this case – involving a *federally* chartered bank and a prior *federal* action – does not even involve federal questions. Both are wrong.

Respondents first argue that the decision below was not inconsistent with the federal laws and regulations governing national banks.

The class asserts the Chinese Wall described in the Comptroller of the Currency's regulations is intended only to prevent the disclosure of material inside information prohibited under the securities laws, and that the information in this case was not such information. The class is wrong on both counts.

The securities laws themselves prohibit trading on material inside information. The Chinese Wall is a prophylactic device to prevent the flow of information to

assure compliance with the securities laws. As a prophylactic device, it is both overbroad and automatic. Rather than have each bit of information analyzed by senior management, as the class suggests, it simply bars the passage of a broad range of information. This is both to eliminate the chance that senior management will mistakenly allow inside information to pass, and to eliminate the administrative and economic difficulties of a particularized review scheme. The Comptroller's regulations, which contemplate a Chinese Wall, vindicate the decision to erect an overbroad wall to prevent accidents and to save management time. To the extent that the class suggests the way to respond to the decision below is with individualized screening, it demonstrates exactly why the decision below conflicts with federal policy.

Moreover, information about the early redemption of notes is material inside information. Information that notes that are *subject* to call *will* actually be called at a premium affects their maturity, yield and market value. It is as surely material inside information as information about an impending tender offer at a premium. *See, Harris v. Union Electric Co.*, 787 F.2d 355 (8th Cir.), *cert. denied*, 479 U.S. 823 (1986) (at 787 F.2d 359, noting that announcement of call caused price to fall $120 per $1,000 bond and holding, at 787 F.2d 366, that this was material). Disclosure of this information by the trust department to the investment department before its general public disclosure would surely have violated the securities laws.

The Commission says that the New Jersey Supreme Court's holding was that as a matter of common law it was "unfair" for the Bank's investment department to give direct notice to its customers while the Bank's trust

department did not give that same notice to all Note holders. As Judge Gaulkin asks in dissent (127 N.J. 344, 381, 605 A.2d 681, 700): "If each department acted appropriately, how is it their combined conduct was inequitable?" There is no general duty for the Bank to treat all of its customers identically. The only answer can be that the New Jersey Supreme Court is creating a common law duty for a national bank acting as a fiduciary.

That duty – that the trust and investment departments act consistently – will require such thorough and consistent communication between the two departments as to make a travesty both of the Chinese Wall and the general requirement of separation.

Middlesex Cty. Sewerage Auth. v. Nat. Sea Clammers, 453 U.S. 1 (1981), cited by the Commission, actually supports the Bank's position that a state common law duty beyond a clearly defined federal scheme cannot survive.

Both the Commission and the class contend that there is nothing inconsistent between 12 C.F.R. § 9.10(a) and the decision below. Yet that regulation requires the Bank to adopt internal rules on investment of unclaimed funds and comply with them, local law, and the governing instrument. This the Bank indisputably did, yet it is being held liable.

Both respondents contend that the decision below did not conflict with the prior federal action arising from the same redemption.

The class says this is so because this is a question of state, not federal law. While the answer may be ascertained by looking at state law, it is a federal statute that says to look at state law, which raises a federal question.

As the cases we cited in our petition show, this Court has repeatedly held that questions about the opening of branch banks raise federal questions although the National Bank Act in that area also defines a national bank's branching power by reference to state law.

The Commission contends there is no private right of action under the Comptroller's regulations. That, of course, is exactly the issue that should have been litigated in the prior federal action.

Finally, the respondents say that the theory on which the New Jersey Supreme Court decided the case, while not briefed to it, was raised in the trial court. Our petition demonstrated how the theory was constructed from snippets of prior documents in an unforeseeable way and then decided on no evidence. We do not contend that oral argument was indispensable; we do contend that some more particular notice of what the court below contemplated was required. While there was, as the class notes, evidence in the record (and common sense says) the Bank earned fees for its activities, there was and is no evidence those fees were "substantial" as the court below assumed.

CONCLUSION

For the foregoing reasons as well as those set out in our petition, this Court should grant a writ of certiorari and reverse the judgment of the New Jersey Supreme Court.

Respectfully submitted,

MICHAEL A. LAMPERT

September, 1992